Filed 8/10/09 In re L.B. CA2/5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re L.B., a Person Coming Under the Juvenile Court Law.	B211876
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. S.B., Defendant and Appellant.	(Los Angeles County Super. Ct. No. CK62945)

APPEAL from an order of the Superior Court of Los Angeles County, Stanley Genser, Juvenile Court Referee. Affirmed.

Catherine C. Czar, under appointment by the Court of Appeal, for Defendant and Appellant.

Raymond G. Fortner, Jr., County Counsel, James M. Owens, Assistant County Counsel, and Tracey F. Dodds, Principal Deputy County Counsel, for Plaintiff and Respondent.

S.B. (mother) appeals from the postjudgment order of October 29, 2008, denying services to reunify with her four-month-old daughter under Welfare and Institutions Code[1] section 361.5, subdivision (b)(10).[2] She contends substantial evidence does not support the order. As substantial evidence supports the findings, we affirm the order.

STATEMENT OF FACTS AND PROCEDURE

L. (the child) was born in July 2008 to mother and A.O. (father),[3] who were living together. The child was detained at birth by the Department of Children and Family Services (the Department), and a section 300 petition was filed[4] because eight older maternal siblings were removed from mother's custody in 2006 due to mother's domestic violence and physical abuse, and mother failed to reunify with them. Reunification services in the older siblings' case were terminated in July 2007.

Concerning her history of domestic violence, mother stated she was arrested and taken to jail on three or four occasions due to domestic violence with a previous boyfriend: twice while pregnant with her two-year-old; and once after the two-year-old was born in 2006. Her arrests were for spousal battery and infliction of corporal injury on spouse/cohabitant. On one occasion, she hit the boyfriend with a hammer, injuring him, as they fought in the presence of all her children. She was ordered to complete a

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1 Hereinafter, all statutory references are to the Welfare and Institutions Code.

2 The order is appealable, as the dependency court did not set a hearing under section 366.26 when it ordered no reunification services for mother. (Compare §§ 395, subd. (a)(1) [a postjudgment order may be appealed as an order after judgment], 366.26, subd. (l) [an order setting a hearing pursuant to § 366.26 is not appealable].)

3 A.O. was found to be the biological father.

4 The petition was subsequently amended to include allegations that the father was transient and unable to provide for the child, and was a registered sex offender.

domestic violence class.[5] Her criminal record revealed she had a prior conviction of infliction of corporal injury on a spouse/cohabitant in 1998. Mother admitted she never completed a domestic violence program.[6]

Mother, who was 34 years old, admitted to a history of illegal drug use, including PCP (phencyclidine). She stated she used marijuana from age 13 to 29 and "sherm" once a month from age 30 to 33. Mother admitted she never completed a drug treatment program.

On July 9, 2008, the dependency court ordered the Department to provide mother with referrals for domestic violence counseling programs and ordered mother to participate in substance abuse counseling with random drug and alcohol testing. Concerning drug testing, mother was a no-show on August 7 and tested negative on August 8 and 15, 2008. The social worker reported, "mother admits [she] has a drug history that remains unresolved and mother has not entered in or completed a drug treatment program."

Mother was arrested on August 25, 2008, and incarcerated in the Century Regional Detention Facility, on an outstanding warrant for a 2006 charge of infliction of corporal injury on a spouse/cohabitant (Pen. Code, § 273.5, subd. (a)), for failure to complete the domestic violence classes previously ordered by the court. Mother's expected release date was December 15, 2008.

The jurisdictional and dispositional hearings were held on October 29, 2008. Mother was still in custody. She presented no evidence concerning the allegations of the

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5 Mother states this was a condition of probation.

6 In July 2008, mother claimed she completed 22 of 52 domestic violence classes at "Drew Child Development" and her contact there was Ms. Muhammad. Mother did not state when she allegedly participated in these classes, that is, whether it was before or after reunification services were terminated in July 2007. In any event, Drew Child Development had no such classes and no counselor named Ms. Muhammad. Subsequently, the social worker found Ms. Muhammad at "King Drew" and learned that mother was not enrolled in domestic violence or the outpatient drug treatment program. Ms. Muhammad encouraged mother to enroll in these programs, but mother declined.

petition, stating she did not wish to be heard as to jurisdiction or wish to cross-examine the social worker. The child was declared a dependent of the court based on sustained allegations of the petition under section 300, subdivisions (a) (risk of serious physical harm inflicted nonaccidentally) and (b) (risk of serious harm due to failure to protect and substance abuse): mother had a history of domestic violence in that her former male companion struck, choked, and threatened to kill her, and mother struck him on the head with a hammer in the presence of all her children, the child's siblings received permanent placement services "due to the mother's domestic violence," and "[s]uch violent conduct on the part of the mother endangers the child's physical and emotional health, safety, and well-being and places the child at risk of physical and emotional harm and damage"; and mother has a history of abuse of illegal drugs, including PCP, which renders her incapable of providing regular care for the child. Custody was taken from the parents.

Concerning the dispositional issue whether reunification should be offered, the Department recommended no reunification for mother under section 361.5, subdivision (b) (10) (no reasonable effort to rehabilitate after failure to reunify with child's sibling).[7] Mother requested family reunification services and presented three letters in support of her request. The letters indicated that, during her current incarceration in Century Regional Detention Facility, she enrolled in parent education and drug education, and on September 23, 2008, completed a one and a half-hour class on domestic violence, life skills, and health. She argued that these efforts constituted a reasonable effort to treat the problem that lead to the older siblings' dependency. Counsel for the child supported the Department's recommendation that no reunification be offered to mother. The dependency court found by clear and convincing evidence reunification services for a sibling were ordered terminated and mother failed to make a reasonable effort to treat the problems that lead to the siblings' removal. "Mother's efforts at rehabilitation occurred after the petition was filed." Such efforts did not constitute a reasonable effort to

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[7] The Department recommended reunification be denied under section 300, subdivision (b)(13) (history of drug abuse and failure to rehabilitate) as well, but the dependency court denied reunification services under subdivision (b)(10) only.

rehabilitate herself. It would not be in the child's best interest to provide mother with family reunification services. Accordingly, pursuant to section 361.5, subdivisions (b)(10), the dependency court did not order reunification services for mother. Reunification services were ordered for father only.

DISCUSSION

Substantial Evidence Supports Denial of Reunification Services

Mother contends the dependency court erred in denying her services under section 361.5, subdivision (b)(10), because substantial evidence does not support the finding that, subsequent to failing to reunify with the child's siblings in July 2007, mother did not make a reasonable effort to treat the problems that led to the siblings' removal. We disagree.

A. Standard of Review

"In reviewing the jurisdictional findings and the disposition [challenged on substantial evidence grounds], we look to see if substantial evidence, contradicted or uncontradicted, supports them. [Citation.] In making this determination, we draw all reasonable inferences from the evidence to support the findings and orders of the dependency court; we review the record in the light most favorable to the court's determinations; and we note that issues of fact and credibility are the province of the trial court. [Citation.]" (*In re Heather A.* (1996) 52 Cal.App.4th 183, 193.) "We do not reweigh the evidence or exercise independent judgment, but merely determine if there are sufficient facts to support the findings of the trial court." (*In re Matthew S.* (1988) 201 Cal.App.3d 315, 321.)

"Findings made at a juvenile dependency hearing where the minors are placed out of the home of a parent must be supported by clear and convincing evidence. [Citation.]

However, on review, this court only determines whether, viewed in the light most favorable to the judgment, there is substantial evidence to support the findings of the juvenile court." (*In re Albert B.* (1989) 215 Cal.App.3d 361, 375.)

B. Section 361.5, subdivision (b)(10)

This section provides reunification services need not be provided to a parent if the court finds by clear and convincing evidence that "the court ordered termination of reunification services for any siblings or half siblings of the child because the parent . . . failed to reunify with the sibling or half sibling after the sibling or half sibling had been removed from that parent . . . pursuant to Section 361 and that parent . . . is the same parent . . . described in subdivision (a) and that, according to the findings of the court, this parent . . . has not subsequently made a reasonable effort to treat the problems that led to removal of the sibling or half sibling of that child from that parent." Mother concedes substantial evidence supports the finding under this subdivision that the child's siblings were removed from mother in 2006 and she failed to reunify with them.

C. Substantial Evidence of Lack of Reasonable Efforts

Pursuant to the sustained allegations of the petition, which mother does not challenge, the child's eight older siblings were removed from mother because of "mother's domestic violence." This included physical violence inflicted on her by her boyfriend and physical violence that mother inflicted on the boyfriend by striking him on the head with a hammer in the presence of the children. Moreover, mother's role as a perpetrator of domestic violence is confirmed by the evidence of her conviction of infliction of corporal injury on a spouse/cohabitant and her recent arrest on an outstanding warrant for infliction of corporal injury on a spouse/cohabitant committed in 2006. Reunification services in the case involving the siblings were terminated in July 2007. As mother acknowledged, she has never completed a domestic violence program.

There was evidence mother was encouraged to enroll in one at King Drew in August 2008, but she failed to do so. There was evidence mother was enrolled in parenting "classes" and a drug education "class" in jail as of a month before the dispositional hearing, but neither of those is a domestic violence program. There was evidence mother attended a "Domestic Violence, Life Skills, and Health" class in jail in late September 2008, but this was only a single, one and a half-hour long class. There is no evidence mother made any significant effort after July 2007 to rehabilitate herself either as a perpetrator or a victim of domestic violence. The foregoing is substantial evidence that, reunification services to the siblings having been terminated in July 2007, mother did not "subsequently [make] a reasonable effort to treat the problems that led to removal of the sibling[s]." (§ 361.5, subd. (b)(10).)

In her argument at the dispositional hearing, mother did not claim that her efforts to rehabilitate herself after reunification services were terminated included participation in 22 domestic violence classes. In the appeal, mother states she had completed part of a domestic violence program prior to her arrest in August 2008, but she does not assert she took those classes after reunification services were terminated in July 2007. We conclude the dependency court properly denied reunification services to mother under section 361.5, subdivision (b)(10).[8]

D. Best Interests of the Child

After finding that reunification services need not be ordered for mother because section 361.5, subdivision (b)(10) applied, the dependency court stated pursuant to section 361.5, subdivision (c), "I do not find clear and convincing evidence that it would be in the best interest of the child to provide mother with family reunification services."

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[8] As reunification was not denied under section 361.5, subdivision (b)(13) as well, we do not address mother's challenge to a denial under that section.

Mother contends the dependency court abused its discretion in declining to find that reunification was in the child's best interest. We disagree.

Section 361.5, subdivision (c) provides in pertinent part: "The court shall not order reunification for a parent or guardian described in paragraph . . . (10) . . . of subdivision (b) unless the court finds, by clear and convincing evidence, that reunification is in the best interest of the child."

We review the dependency court's exercise of discretion for abuse of discretion. (See *Cheryl P. v. Superior Court* (2006) 139 Cal.App.4th 87, 96, fn. 6; *In re Christopher H.* (1996) 50 Cal.App.4th 1001, 1006 ["The court has broad discretion to determine what would best serve and protect the child's interest and to fashion a dispositional order in accord with this discretion."].)

"The juvenile court's broad discretion to determine what best serves a child's interests will not be reversed absent a clear abuse of discretion. [Citation.] As our Supreme Court has recently noted, the scope of that discretion is broad: 'This determination was committed to the sound discretion of the juvenile court, and the trial court's ruling should not be disturbed on appeal unless an abuse of discretion is clearly established. [Citations.] As one court has stated, when a court has made a custody determination in a dependency proceeding, "'a reviewing court will not disturb that decision unless the trial court has exceeded the limits of legal discretion by making an arbitrary, capricious, or patently absurd determination [citations].'" [Citations.] And we have recently warned: ["']The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court.'" [Citations.]' (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318-319.)" (*In re Tanis H.* (1997) 59 Cal.App.4th 1218, 1227-1228.)

The burden of proof is on the parent to show that reunification is in the child's best interest. (*Raymond C. v. Superior Court* (1997) 55 Cal.App.4th 159, 163.)

Parents of very young children who are offered reunification services generally have only from the date of the disposition hearing to the date of the first six-month

review hearing to reunify. (§ 361.5, subd. (a)(1)(B) [2009].) The six-month review hearing was set for March 3, 2009. Mother was in jail. She was not enrolled in a domestic violence rehabilitation program. With an expected release date of December 15, 2008, mother would be free of incarceration for two and a half months before the cut-off. Mother made no showing that would be enough time for her to become rehabilitated. Moreover, the child was detained from mother when she was only one day old, and mother subsequently had one visit with her. It is reasonable to infer from the foregoing that the provision of reunification services would not result in mother reunifying with the child. Thus, the dependency court's ruling declining to order reunification services was not an abuse of discretion.

DISPOSITION

The order is affirmed.

KRIEGLER, J.

I concur:

MOSK, J.

ARMSTRONG, J., Dissenting.

I respectfully dissent.

Appellant cannot be denied reunification services unless there is clear and convincing evidence that she did not make "reasonable efforts" to resolve the problems which led to the removal of her older children. I do not see such evidence, and would reverse.

L.B. was born drug-free and healthy. Appellant had had prenatal care, and had not used drugs or alcohol during her pregnancy, or for several years before. She had a place to live, and was prepared to care for her child. She had family and friends as a support system and was receptive to the child-care information the social worker provided.

The social worker who saw appellant and L.B. at the hospital observed L.B. sleeping in a car seat on appellant's bed. L.B. was appropriately dressed and of healthy weight and size, and when she woke up she was alert. The social worker saw "a healthy bond." Even the hospital worker who contacted DCFS said that there were no known risk factors for the child, and that appellant and her child were bonding well.

At an earlier time, with a former male companion, C., appellant had engaged in domestic violence. However, appellant had extricated herself from that relationship well before L.B. was born. Appellant did not live with C. and indeed had obtained a restraining order against him. Not only that, she was able to communicate with him, non-violently, on issues concerning their child.

There was no evidence of domestic violence between appellant and L.B.'s father, or of domestic violence in any of her current relationships. Instead, since the prior dependency, she had maintained a violence-free life.

She had also completed a parent education class and taken some domestic violence classes.[1] During this dependency, in an effort to make herself ready to care for L.B., she was insistent in her requests that she be allowed to drug test. She acknowledged that she was in violation of her probation violation on a 2006 conviction, and turned herself in on the resulting warrant. While she was incarcerated, she participated in a drug education class, a parent education class, and a domestic violence class.

Section 361.5, subdivision (b) allows denial of reunification services where it would be "fruitless" to provide such services. (*Deborah S. v. Superior Court* (1996) 43 Cal.App.4th 741, 750; see also *Renee J. v. Superior Court* (2001) 26 Cal.4th 735, 744 [partially superseded by statute].) Because family preservation is the first priority when dependency proceedings are commenced (*In re Elizabeth R.* (1995) 35 Cal.App.4th 1774, 1787), "fruitless" is a "pretty high standard," and "'reasonable effort to treat' . . . is not synonymous with 'cure.'" (*Renee J. v. Superior Court* (2002) 96 Cal.App.4th 1450, 1464.)

I cannot see that this is a fruitless case, or that DCFS met its burden of showing, by clear and convincing evidence, that appellant did not make "a reasonable effort to treat the problems that led to removal of the sibling or half sibling . . . ." (§ 361.5, subd. (b)(10).)

The "problems that led to removal" of appellant's older children concerned domestic violence between appellant and C. Yet, our record does not include the earlier petition, or establish the date on which it was filed, or the date on which it was sustained, or the grounds on which it was sustained, or the services which were ordered, or anything

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[1] Appellant's statement that she had taken 22 of 52 domestic violence classes at Drew Child Development Center, with a Ms. Muhammad as her contact, was not rebutted by DCFS's report there was no Ms. Muhammad at Drew, and no domestic violence classes -- because DCFS later reported on a social worker's conversation with appellant's counselor at King Drew, Ms. Muhammad. Our mandate to indulge all legitimate inferences in favor of the judgment does not mean that we must accept as true information which DCFS itself contradicted.

about appellant's compliance except that it was not sufficient to result in reunification. We know little about appellant's problems, and nothing about the effect those problems had on her older children, or how well or poorly they did in her care, whether they saw appellant on visits, or indeed anything else about them except their names and ages.

What is more, while section 361.5 begins with the past, it then looks to the future, by asking whether the problems of the past have been addressed. The statute is consistent with rule that "While evidence of past conduct may be probative of current conditions, the question under section 300 is whether circumstances *at the time of the hearing* subject the minor to the defined risk of harm." (*In re Rocco M.* (1991) 1 Cal.App.4th 814, 824.)

Here, the evidence was that, in the words of the hospital worker, there were no current risk factors for L.B. Appellant did not complete domestic violence classes, but nothing in the dependency statute dictates that a program or class is the only way to treat a problem. Nothing in this record establishes that the classes appellant did take were insufficient. To the contrary, her violence-free life suggests that they were sufficient.

Nor do I agree with the majority that evidence supports a conclusion that reunification services would not be in L.B.'s best interest. The grant of reunification services would not have delayed permanency for L.B., because her father -- a transient, unemployed, registered sex offender who failed to keep DCFS apprised of his address and who did not honestly describe the facts of his criminal conviction offense to DCFS -- was granted such services. Instead, the grant of reunification services to appellant would have held open the possibility that L.B. could be raised by the mother with whom she had, at birth, a healthy bond. That would have been in L.B.'s best interest.

"If the evidence suggests that despite a parent's substantial history of misconduct with prior children, there is a reasonable basis to conclude that the relationship with the current child could be saved, the courts should always attempt to do so. . . . The failure of a parent to reunify with a prior child should never cause the court to reflexively deny that parent a meaningful chance to do so in a later case. To the contrary, the primary focus of the trial court must be to *save* troubled families, not merely to expedite the creation of

what it might view as better ones." (*Renee J. v. Superior Court, supra,* 96 Cal.App.4th at p. 1464.) Under that rule, appellant was entitled to an opportunity to attempt to save her family.

ARMSTRONG, Acting P. J.